



Subdivision Review Predetermination Guidance

(Updated 3/14/23)

Purpose

The purpose of our Subdivision Review Predetermination process is to inform the requestor whether 1- their proposed project will need a water right permit (and if that permit exists) or 2- if their proposed water use plans meet statutes/rules for using water right permit exceptions (certificates). This process stems from a Memorandum of Understanding (MOU) between DEQ and DNRC signed on September 19, 2014. A copy of this MOU is available in [ROCO > Processes > DEQ MOU](#). Our predetermination letters are used by DEQ as a check in their subdivision review process, per ARM 17.36.103(s), to ensure a water right is obtainable before a subdivision is approved.

DNRC's combined appropriation guidance is key to our reviews, where the ability for a project proposal to rely on water right exceptions may be dependent on which definition of "combined appropriation" applies, based on when the parcel or parcels were created.

Initial Review Process

As of January 17, 2023, individuals are required to submit their project proposal on the standard form designated by DNRC. A version of this form was previously available but not required. Several attachments are required to be submitted along with the form. Also as of January 17, 2023, along with each project proposal the individual must include landowner signatures for all parcels involved in the project. The goal of this requirement is to ensure water use plans are being discussed with all landowners that will be affected by the proposed water use allocations. DNRC staff can continue to communicate with consultants regarding questions or deficiencies in a proposal.

Upon receipt of the project proposal, DNRC staff should review the proposal to understand the type of project and determine whether there are deficiencies. DNRC must respond with a predetermination within 20 business days of receiving a complete request free of deficiencies. On the date the proposal is received, you should enter the proposal in your office's tracking spreadsheet.

If the proposed project does not appear ready for subdivision review, such as a feasibility study or a project concept with no details, respond to the requestor and let them know that our predetermination process is only for projects ready for subdivision review. Also, we only review projects where one or more resulting lot is less than 20 acres – if all lots involved in the project are remaining over 20 acres, let the requestor know we will not review the project. The reason for this is that our review is tied to the DEQ subdivision review in 76-4, MCA, where "subdivision" refers to a division of land that creates one or more parcels containing less than 20 acres (76-4-102, MCA). Feel free to share our Combined Appropriations Guidance with them if it seems they are seeking general information about water use planning with groundwater certificates.

After an initial review of the project, one of three actions should be taken:

1. **Send a “Predetermination Cannot Be Made” letter.** If the proposal is grossly deficient, the proposal identifies existing water use that does not have a water right, or deficiencies are not resolved within five business days, return the proposal to the requestor along with a “Predetermination Cannot Be Made” letter.
 - a. A proposal is grossly deficient if it meets one or more of the following criteria:
 - i. An entire section of the form (as defined by the form’s bullet points) is not filled out.
 - ii. A required attachment is missing.
 - iii. Required signatures are not included.
 - b. To establish consistency among offices, if a proposal meets the criteria for grossly deficient or identifies existing water use that does not have a water right, the proposal must be returned to the requestor.
2. **Notify the requestor of deficiencies.** If there are deficiencies in the proposal, but the proposal is not grossly deficient, respond to the requestor via email and inform them of the deficiencies. State clearly in your email that they have five business days to respond to your deficiency email. The following boilerplate message may be included:
 - a. “This is the only notification of deficiencies that will be sent. If the requested information is not received within five business days of this email, we will notify you that a predetermination cannot be made. You will then need to resubmit a new request once you compile all required information.”
 - b. If you have not received a satisfactory response within five business days, send a “Predetermination Cannot Be Made” letter to the requestor.
3. **Draft a predetermination letter.** If all required information is submitted and there are no deficiencies, proceed to fully reviewing the project and drafting a predetermination letter, based on one of three templates.
 - a. Predetermination – Permit Needed
 - b. Predetermination – Fits Exceptions
 - i. Note that there are two different sections of draft language in this template; choose the appropriate section based on the type of project you are reviewing:
 1. Projects where no new lots are being created. The lots involved in the project are not considered a combined appropriation and no specific volume allocation among lots is required.
 2. Projects where new lots are being created and they will be considered a combined appropriation.
 - c. Predetermination – Connecting to Public System
 - i. Under ARM 17.36.103(s), subdivisions proposing to connect to existing public systems are not required to obtain a letter from DNRC. However, if a predetermination is requested for a project proposing to connect to a public system, review the water rights in place and draft a letter using this template. If new lots are created, map the lots as a Controlled 602 Area, but no specific water allocation per lot is required if they are not proposed to use permit exceptions (602s).

Reviewing the Project

There are several questions you should consider while reviewing the proposed project. Your goal is to determine whether the proposed project will require a permit or whether it meets water right permit exceptions. You may also at this stage still be considering whether the proposed project requires a predetermination at all.

Questions to Consider:

1. **How many parcels are being created by the proposed subdivision?** Be sure to consider how many parcels existed before the subdivision, and how many will exist after. A boundary line adjustment (BLA) or aggregation of parcels may result in new parcels being created.
 - a. **Aggregation example:** If four existing 2.5-acre parcels (10 acres total) are being aggregated so that the same 10 acres is now comprised of two 5-acre parcels, those two 5-acre parcels are considered “new” parcels.
2. **What are the sizes of the proposed parcels?** If a resulting parcel is 20 acres or greater in size, that parcel will not be considered in our review. If no new parcels under 20 acres are being created in the proposed project, we should review the project or write a letter – just respond to the requestor and let them know we review only projects where or more resulting lot is less than 20 acres in size.
3. **When were the parcels created?** If the proposal entails a review of water use plans for parcels already in existence (as opposed to parcels being created), review when the parcels were created. The date a parcel was created determines which definition of “combined appropriation” will apply to that parcel.
 - a. The date a parcel was created is generally the date the COS was recorded.
 - b. For a parcel created via a Court order, the date of the Court order is the date the parcel is created.
 - c. If a subdivision application was submitted to DEQ (and fees were paid) on or prior to October 17, 2014, the parcels created by that subdivision are treated as being created on or prior to October 17, 2014. If this scenario applies to a project proposal and the requestor intends for the parcels to be grandfathered into the 1993 rule definition of “combined appropriation”, the requestor needs to provide adequate documentation.
4. **Which definition of “combined appropriation” applies to the project proposal?** Based on your answer(s) to the last question, consider whether existing and proposed uses of water will be considered a combined appropriation. Refer to DNRC’s Combined Appropriations Guidance document for more information, and keep in mind that only Groundwater Certificates would be part of combined appropriations, not Permits or Statements of Claim. This will help to determine whether the proposed project requires a permit or can meet permit exceptions and use certificates.
5. **Do the proposed water use volumes conform to Department standards?** Keep in mind that DNRC does allow a minimum of 0.28 AF for domestic use on a single household. DNRC will allow a lower volume for domestic use on a single household only if DEQ has already approved a deviation, and documentation of that deviation is provided along with the predetermination request. If the request deviates from the Department standard for lawn and garden irrigation (2.5 AF/acre), reasonable documentation must be provided.
6. **Is the proposed water use consistent with any applicable covenants, conditions, and restrictions (CC&Rs)?** This consideration most frequently comes up with projects that propose no lawn and garden use for domestic parcels in new subdivisions.

7. **Are all existing rights within the project area accounted for in the proposal?** Existing water rights may need to be quantified or reduced before a predetermination can be made for the proposed project. Ensure that any corrections or reductions are well-documented and are processed before a predetermination letter goes out. If an existing water right has out-of-date ownership, notify the requestor and encourage them to file ownership updates. However, inaccurate ownership is not a deficiency in the subdivision review process.
8. **Is the project within a controlled groundwater area?** This may affect their ability to use permit exceptions.
9. **Have these parcels already been reviewed?** Are they within a mapped controlled 602 area? Is this a rewrite?
10. **If the proposed project entails the use of permit exceptions (certificates), does the existing and proposed use of certificates stay under the 35 GPM flow rate/10 AF volume limitations?** Have they explained how the full 10AF exception amount will be allocated?
11. **If the proposed project entails the use of a permit, has the requestor already applied for a permit?** At which stage of the process are they in?
12. **Which letter template do I use?**
 - a. If a permit is in place or needed for the proposed project, use the Permit Needed letter.
 - b. If the proposed project is proposing to connect to a public system, use the Connecting to Public System letter.
 - c. For all other projects, use the Fits Exception letter. This letter can take shape to fit a variety of projects – select the language options in the template to fit the project being reviewed.

Drafting the Letter

1. Choose the appropriate template (“Permit Needed” or “Fits Exceptions” or “Connecting to Public System”) and edit the highlighted sections to accurately reflect the proposed project and your determination.
2. Ensure the letter is on letterhead from your regional office.
3. Ensure that all required boilerplate messaging is still included in your letter – this includes notification that the letter is not a preapproval for a water right, and also includes details about the *Clark Fork Coalition et al v. DNRC et al. case*.
4. Begin the file name with the letter identifier, for example “HRO 22-1”. Feel free to include a general project name in the file name as well.
5. Send your letter to a coworker for review, as determined by your regional office.

Submitting the Letter

1. Compile your predetermination letter and proposal materials into a single PDF and send it to the requestor, with Leata English at DEQ cc'd (lenglish@mt.gov). The purpose of sending the proposal materials to DEQ is so they can ensure the project details have not changed between the version we reviewed and the version they are reviewing.
 - a. The letter requestor doesn't necessarily need the proposal materials sent back to them, so it is fine to send them only the letter if you want.
2. Ensure your tracking spreadsheet is up to date with the details of the project and reflects that the letter has been sent to the requestor.
3. Save the final PDF in your regional office folder within ROCO.

Updating Converge

1. If the project proposal involves creating new parcels, update the “Controlled 602 Area” map layer on Converge to reflect that a predetermination exists for the reviewed parcels. Future staff processing 602s in this area will rely on the information in Converge to alert them to water use allocations described in the predetermination letter. Ensure the text for your mapped area includes the letter identifier (e.g., HRO 22-1) and includes a summary of pertinent information. Staff will have access to the stored letters on ROCO as well.
 - a. Regional offices were previously inconsistent in deciding when to add to the Controlled 602 Layer. As of January 17, 2023, DNRC staff should only add to this layer when a predetermination letter is written for a project creating new parcels.

FAQs and Unique Scenarios

1. Question: If a project proposal specifically states that existing water use began pre-July 1, 1973, and notes that this water use is exempt from filing, is this existing water use required to have a water, right? Is that water use considered in our review?
 - a. Answer: If the existing water use is specifically stated to be exempt and it seems reasonable that the use would have begun pre-July 1, 1973, that existing use is not required to have a water right, and that use will not be considered in our review.
2. Question: A project proposal includes using water from a well located on an adjacent parcel (Lot A) that is not part of the review. Is that water/that well/that parcel now pulled into the review and considered part of a combined appropriation with the lots being reviewed?
 - a. Answer: If the water from Lot A is not physically manifold with any water coming from the parcels under review, the water from Lot A is not considered part of a combined appropriation with the lots being reviewed. This part of their plan should be identified in your review letter.
3. Question: If the proposed project creates a utility lot where no water use is proposed, do we need to write a predetermination letter?
 - a. Answer: Yes, we still need to write a letter and send it to DEQ. We also need to map the area so that we properly apply combined appropriation rules if future 602s are filed.